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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 485

CROSLEY BROADCASTING CORPORATION, *Petitioner*,

v.

WHBC, INC., and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit have not been officially reported and are printed as Appendix A hereto. They include: the June 16, 1958 opinion and order of the panel which first heard and decided the case (Chief Judge Edgerton and Circuit Judges Wilbur K. Miller and Washington); the September 25, 1958 opinion of the court en banc denying a petition

for rehearing; and the court's October 10 sua sponte modification of its September 25 en banc opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The court of appeals vacated a final decision of the Federal Communications Commission resolving a four-party comparative television licensing proceeding which had been pending before the Commission for three and one-half years. On the final decision day, two separate votes were taken by the Commission on the choice of the best applicant. In the first vote, six of the Commission's seven members participated; the seventh, who had been appointed but not confirmed as a commissioner at the time of oral argument ten months earlier, abstained. A plurality of three commissioners voted for petitioner Crosley Broadcasting Corporation, one commissioner voted for a second applicant, one voted for a third applicant, and one voted to reopen the record as requested by the fourth applicant. In the second vote, all commissioners participated. The commissioner who previously had abstained was induced by his colleagues to participate, and he voted for petitioner. Thus, ultimately four commissioners voted for petitioner, one voted for a second applicant, one voted for a third applicant, and one voted to reopen the record as requested by the fourth applicant. The court of appeals held that the commissioner who originally had abstained was disqualified from voting by virtue of not having heard oral argument, and that a majority—as opposed to a

plurality—vote of participating commissioners was necessary for a legally valid decision.

The following questions are presented:

1. Is a majority, as distinguished from a plurality, of the votes cast by the qualified and participating members of the Commission necessary for the adoption of a valid decision in cases involving more than two applicants?

2. Does section 10(e) of the Administrative Procedure Act authorize or permit a reviewing court to substitute its judgment for that of the Commission which had found that a previously unconfirmed appointee to the Commission, ultimately could vote on the final decision by virtue of the fact that preliminary to the oral argument, the Chairman had asked if there were any objections to participation in the case by "any commissioner who is not present," and no objection was stated?

STATUTES INVOLVED

Three statutory provisions are involved. They are sections 4(h) and 409(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(h) and 409(b), and section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e). [This provision of the Administrative Procedure Act is incorporated by reference into section 402(g) of the Communications Act, 47 U.S.C. § 402(g).] These provisions are set forth in Appendix B hereto.

STATEMENT OF THE CASE

The action of which review is sought vacated a final decision of the Federal Communications Commission which was adopted on March 6, 1957. That decision

finally resolved a four-party comparative proceeding involving mutually exclusive applications for a television broadcast station on channel 13 at Indianapolis, Indiana. The four applicants for this facility were Crosley Broadcasting Corporation (petitioner here and intervenor below); WIBC, Inc. (respondent here and appellant below); and Indianapolis Broadcasting, Inc. and Mid-West T.V. Corporation, which are no longer parties in interest.

The Commission's decision was based on extensive proceedings conducted over a period of some three and one-half years. It granted the application of petitioner and denied those of the three competing applicants. All losing applicants noted appeals to the United States Court of Appeals for the District of Columbia Circuit pursuant to section 402(b) of the Communications Act, 47 U.S.C. § 402(b).

As significant here, the proceedings before the Commission can be summarized as follows:

The taking of evidence before an examiner of the Commission began on March 10, 1954. On June 7, 1955, the hearing examiner released an initial decision recommending a grant of the application of Mid-West T. V. Corporation. (J.A. 10.) All parties to the proceeding subsequently filed exceptions to the initial decision and requested oral argument pursuant to section 409(b) of the Communications Act.

When the case came on for oral argument before the Commission on May 25, 1956, six commissioners were present. They were Chairman McConnaughey and Commissioners Hyde, Bartley, Doerfer, Lee and Mack. (J.A. 6.) Only Commissioner E. M. Webster, whose term was about to expire (on June 30, 1956),

was absent. One week prior to the oral argument, on May 18, 1956, President Eisenhower had nominated T. A. M. Craven to succeed Commissioner Webster for a seven-year term to commence July 1, 1956. Mr. Craven's nomination was then awaiting confirmation by the Senate, as all parties to the proceeding well knew. [102 CONG. REC. 8516 (May 18, 1956).]

After counsel for all parties had entered their appearances and immediately prior to the commencement of oral argument, the following exchange took place (J.A. 8):

> The Chairman: "Gentlemen, do you have any objection to any commissioner who is not present participating in this proceeding?"
>
> (No response.)
>
> The Chairman: "You may proceed."

The nomination of T. A. M. Craven to succeed E. M. Webster as a member of the Commission was confirmed on June 22, 1956 [102 CONG. REC. 10860 (1956)]; he assumed office on July 2, 1956. [*23d Annual Report of the Federal Communications Commission to Congress,* pp. 19, 166 (1957).]

On October 29, 1956, before any action had been taken by the Commission following oral argument, Mid-West T. V. Corporation filed a petition to reopen the record to show the resignation of its president and a change in its stock ownership, and for leave to amend its application. No action was to be taken on this petition by the Commission until March 6, 1957.

On February 27, 1957, the Commission met in executive session for the purpose of considering the

adoption of a decision in the case. Present at that meeting were Chairman McConnaughey, and Commissioners Hyde, Bartley, Doerfer, Lee, Mack, and Craven. After a discussion of the case, a vote was taken. Three commissioners (McConnaughey, Doerfer, and Mack) voted for petitioner. Two commissioners (Hyde and Bartley) voted against adopting the decision favoring petitioner. One commissioner (Lee) voted for Indianapolis Broadcasting, Inc. Commissioner Craven abstained. (J.A. 190.) Chairman McConnaughey stated that if Commissioner Craven did not vote, "the Commission will find itself at an impasse, with its statutory duty to render a decision thwarted." (J.A. 191.)

Commissioner Craven stated that he had abstained from the initial vote because "the engineering firm with which I was formerly associated" had prepared engineering data on behalf of one of the applicants. "Therefore, I would not wish to vote unless required to do so." He noted that the general counsel had previously submitted a memorandum to the Commission saying that regardless of prior connections with a party, an abstaining member can be required to vote in order to enable the Commission to reach a decision. (J.A. 191.)

The general counsel of the Commission was then called to the meeting and asked the hypothetical question of "whether a Commissioner could disqualify himself from voting if the effect would be to prevent action by the Commission upon a matter before it." (J.A. 192.) The general counsel advised that if a decision could not be reached without such a vote, "it would be appropriate for the Commission, by minute entry, to direct Commissioner Craven to participate

on the grounds that his vote was absolutely essential to the performance of the Commission's statutory duties." (J.A. 192-3.) The general counsel then left the meeting.

Commissioner Craven then stated:

> "I was not a member of the Commission when the Oral Argument was held, but the question was asked by the Chairman of the counsel present if there were any objections to absent Commissioners participating in the decision. There was no response from counsel. I have read the Oral Argument in this case and also the records necessary for me to arrive at a decision. Therefore, if it should become necessary for me to vote as a result of a directive from the other members of the Commission to break a tie I feel prepared to do so." (J.A. 193.)

The members of the Commission then discussed whether a voting impasse could be avoided without Commissioner Craven's participation. (J.A. 193.) He himself stated that he believed the other commissioners should take more time to consider the case, to make certain that they were at an impasse. (J.A. 193-4.) Accordingly, further action on the matter was deferred for a week.

One week later, on March 6, 1957, the case again was brought up for consideration. The first matter dealt with was the Mid-West petition to reopen the record. Chairman McConnaughey and Commissioners Doerfer, Lee, and Mack voted to deny this petition; Commissioners Hyde and Bartley voted to grant the petition; Commissioner Craven abstained. A vote was then taken "on the Decision [in favor of Crosley] as presented to the Commission." Commissioners

McConnaughey, Doerfer, and Mack "voted to adopt the Decision; Commissioner Hyde voted to reopen the record [pursuant to the Mid-West petition, notwithstanding the Commission's immediately prior vote *contra*]; Commissioner Bartley voted for WIBC and Commissioner Lee voted for Pulliam [Indianapolis Broadcasting, Inc.]." (J.A. 195.)

Commissioner Lee—who voted against petitioner—stated that Commissioner Craven had read the record, and that he was sure Commissioner Craven "would render his best judgment" and could vote. Chairman McConnaughey and Commissioner Mack agreed. (J.A. 195-6.) Commissioner Hyde stated that he did not think that they should ask Commissioner Craven to vote. In his opinion: (1) they had not studied the legality of Commissioner Craven's vote sufficiently; and (2) they had not studied the overall case enough to be certain that a stalemate had been reached. (J.A. 196.)

Commissioner Lee replied that Commissioner Craven had a duty to vote. (J.A. 197.) Commissioner Doerfer stated that the delays in the case had been long, and that the three favoring Crosley had made it clear several times that they would not change their votes. Thus, said Commissioner Doerfer, even if one of the other three applicants could get all of the remaining three votes, the "best these can do [from the standpoint of one of the other applicants] is create an interminable tie." (J.A. 197.)

Four of the other six commissioners thus urged Commissioner Craven to vote. Commissioner Hyde was opposed, and Commissioner Bartley did not take a specific position. (J.A. 196.) At the request of the

majority, Commissioner Craven did vote, selecting petitioner as the best qualified applicant. (J.A. 198.) Further discussion was had (J.A. 198-201), after which Commissioner Craven repeated his vote for Crosley, stating: "I vote for the proposed decision and will have a statement on it." (J.A. 202.) While the Commission's minutes thus make clear the exact nature of the votes cast, the mimeographed copy of the decision released March 8, 1957, commences merely by stating: "By the Commission: Commissioners Hyde and Bartley dissenting and issuing statements; Commissioner Lee dissenting; Commissioner Craven concurring and issuing a statement." (J.A. 9.)

All three losing applicants thereafter noted appeals to the United States Court of Appeals for the District of Columbia Circuit. Indianapolis Broadcasting, Inc. dismissed its appeal (Case No. 14037) on December 20, 1957. Mid-West T. V. Corporation dismissed its appeal (Case No. 14039) on January 10, 1958. The appeals filed by respondent WIBC, Inc. (Cases No. 14035 and 14231) were consolidated for briefing and argument. The case was argued on June 4, 1958, and disposed of twelve days later by the court's order of June 16, 1958.

In its order of June 16, the court of appeals made no reference to the plurality versus majority question which had been stressed by petitioner Crosley. Rather, in holding that respondent WIBC had "not clearly waived" the right to oral argument before Commissioner Craven, the court stated that Commissioner Craven's vote "was decisive" and hence remanded the case for reargument. (Appendix A, p. 1a.)

On July 1, 1958 Crosley filed a petition for rehearing en banc, emphasizing the fact that it relied upon

not one, but two points: (1) that objection to Commissioner Craven's participation had been waived; and (2) that Commissioner Craven's participation had no effect on the result since valid action had been taken by a plurality of the Commission's membership without his participation. On September 25, 1958, the court of appeals denied the petition for rehearing en banc, again not specifically answering the plurality-majority question. (Appendix A, pp. 2a-4a).)

On September 26, 1958, petitioner filed a motion for stay of the transmission of the court's mandate pending the preparation of this petition for a writ of certiorari. That motion was denied on October 9, 1958. One day later, on October 10, 1958, the court of appeals issued a sua sponte modification of its September 25 opinion denying the petition for rehearing. In its modification, the court specifically held that: "When a quorum is present, the Federal Communications Commission may act, but only on a vote of a majority of those present." (Appendix A, p. 5a.)

REASONS FOR ALLOWANCE OF THE WRIT

(1) The court of appeals' action in holding that the Federal Communications Commission may validly adopt a final decision in a four-party comparative television licensing proceeding only upon the vote of a majority of those qualified and participating is not only contrary to law, but destructive of proper agency action here and elsewhere. The court's erroneous ruling on the "majority" question will further impede action of the Commission in an area where action is already difficult and delayed.

(2) The court's action in substituting its judgment for that of the Commission concerning events which

happened in the Commission's presence and upon which the Commission relied through subsequent stages of the proceeding is not only contrary to the decision of this Court in the case of *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952), but is also beyond the power and authority conferred upon a reviewing court by section 10(e) of the Administrative Procedure Act.

(3) Because of the subject matter dealt with and the identity of this particular court of appeals, the effect of the court's decision as precedent can scarcely be overstated. The decision contains two fundamental errors and strikes at the very basis of an ultimate agency function—the adoption of a final order. The fact that the entire court of nine judges specifically affirmed both the action and the reasons of the panel which originally decided the case further highlights the significance and importance of the ruling.

ARGUMENT

I

The court's action in holding invalid the Commission's "first" vote of March 6, 1957, in which only six commissioners participated, is based squarely on its opinion that a majority, as distinguished from a plurality, of those participating was necessary for the adoption of a valid order. This proposition is contrary to both law and reason, and the cases cited by the court in support of its action are inapposite.

The rule of law applicable here, which the court refused to apply, is as old as democratic government itself. It is that in the absence of a specific mandate, arising out of a constitutional provision, a rule of

legislative assembly, or a statutory provision, only a plurality, as distinguished from a majority, vote is necessary for legal action. The reason for this rule is as free from controversy as the rule itself. The official acts of both state and national officials throughout the history of our government have been upheld, wherever possible, since otherwise the necessary and orderly functioning of government would be unduly impeded. Virtually every decided case relating to elections, legislative proceedings, and the conduct of other governmental functions has applied this concept of liberality as long as the specific requirements of any overriding mandate have been met.[1] Here, in the absence of any such mandate, the plurality rule was and is applicable, and the court should have so found.[2]

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[1] *E.g.*, *State* ex rel. *Cleveland* v. *Stacy*, 263 Ala. 185, 82 S. 2d 264 (1955); *Ramsey* v. *Dunlop*, 146 Tex. 196, 205 S.W. 2d 979 (1947); *Howell* v. *Bain*, 176 Ore. 187, 156 P. 2d 576 (1945); *Brannon* v. *Perkey*, 127 W. Va. 103, 31 S.E. 2d 898 (1944); *State* ex rel. *Thompson* v. *Carr*, 166 Tenn. 58, 59 S.W. 2d 510 (1933); *Derringe* v. *Donovan*, 308 Pa. 469, 162 Atl. 439 (1932); *Taber* v. *Webb*, 227 Ky. 611, 13 S.W. 2d 758 (1929). A typical statement of the rule is that "a quorum of the members being present and voting for candidates, a plurality of the votes cast is sufficient to elect." *State* ex rel. *Attorney General* v. *Anderson*, 45 Ohio St. 196, 203, 12 N.E. 656, 659 (1887). See also II COOLEY, CONSTITUTIONAL LIMITATIONS 1400 (8th ed. 1927); THROOP, PUBLIC OFFICERS § 139 (1892); 29 C.J.S., *Elections* § 241 (1941).

[2] The court of appeals apparently has been confused from the outset by the majority-plurality concept. It stated in its September 25 opinion that "a plurality of a quorum of four cannot be less than a majority of it." (Appendix A, p. 3a.) This statement is true when only two parties or courses of action are involved, but is erroneous in the case of multiple parties or multiple courses of action (*e.g.*, in the case of a 2-1-1 vote). The court sua sponte withdrew this statement in its October 10 amendment, apparently realizing its obvious error, but then relied upon cases virtually all of which related to dual choice situations. (Appendix A, p. 5a.)

The error in the court's position is perhaps best illustrated by the specific cases upon which it relies. Most of those cases involve a situation where the choice is between one of only two alternatives; one of them involves an interpretation of a state statute requiring a majority; and none of them makes the holding for which they have been cited by the court.[3]

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[3] Thus, in *WHEC, Inc.*, 10 PIKE & FISCHER RADIO REG. 521 (1954), the Federal Communications Commission could vote only to grant the application in question without a hearing, or alternatively to designate it for hearing. In *Olsen* v. *State Tax Comm'n*, 109 Utah 563, 168 P. 2d 324 (1946), the only alternative was whether or not certain of appellant's sales were within a statutory exemption to the state sales tax. In *United States* v. *Ballin*, 144 U.S. 1 (1891), the sole alternative was a vote for or against a section of a tariff act. In *Frischer* v. *Bakelite Corp.*, 39 F. 2d 247 (C.C.P.A.), *cert. denied*, 282 U.S. 852 (1930), the only choice was whether or not the manufacture and sale of certain commodities constituted a patent infringement and an act of unfair competition. (As to the form of enforcement in this latter case, the sole choice was a vote approving or disapproving each of three enforcement recommendations to the President, with the vote on each recommendation not being contingent upon the votes on the others.)

The court's reliance upon *WJR, The Goodwill Station, Inc.*, 11 PIKE & FISCHER RADIO REG. 1321 (1955), is subject to the same criticism in that the Federal Communications Commission could only grant or deny a petition for rehearing. Moreover, while three applicants were competing for the available facility, the prevailing applicant had received a vote of the majority of the participating commissioners, and therefore the Commission was not called upon to determine whether the lesser vote of a plurality would have resulted in a valid decision.

In *Adkins* v. *Citizens Board*, 112 W. Va. 171, 163 S.E. 853 (1932), the West Virginia court was construing a local statute which superseded the general rule. *Brown* v. *District of Columbia*, 127 U.S. 579 (1888), is not pertinent even in the remotest sense since it involved the question of the efficacy of a contract entered into by a member of a board, purporting to act under the board's authority. The Court simply stated that the contract must be ratified by a majority of the five-man board.

The difficult, if not impossible, situation presented by the requirement of a majority vote in a case such as this one—where any one of four basically qualified applicants was open for selection—is so manifest as to require no extended treatment. Nor is the factual situation in the present case an exceptional one. On the contrary, it is typical of a situation which has occurred and will recur in a substantial class of cases.

As the result of a study conducted by the Commission for a subcommittee of the Congress, it was established that for the period between July 1, 1954 and March 7, 1958, 22 of the 53 comparative television hearings conducted by the Commission involved more than two applicants. Fourteen of these proceedings involved three applicants; five involved four applicants; two involved five applicants, and one involved seven applicants.[4] Moreover, the period covered by this study is typical of that which preceded and has followed it. Since the adoption of the present national television allocation plan in April 1952, the demand for television stations in the VHF portion of the spectrum has been so great as to result in one or more multi-party comparative proceedings for channels in virtually every metropolitan area of substantial size throughout the United States. The continuing scarcity and increasing commercial value of such facilities can only result in an accentuation of this condition in the future.

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[4] Testimony and exhibit submitted in connection therewith by James P. Radigan, Senior Specialist on American Public Law, Library of Congress, before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., May 15, 1958 (not yet officially printed).

The fact that the majority vote requirement will unduly restrict and retard the performance of agency action in an area where such action is already difficult and delayed can perhaps best be illustrated by further reference to this case and its background.

The Federal Communications Commission is an agency consisting of seven members serving terms of seven years each, with the term of one commissioner expiring annually. The vast majority of all proceedings conducted by it of an adjudicatory nature are tried initially before examiners. Many of these cases, particularly in the broadcast licensing field, require years for their completion. In all cases tried initially by an examiner, section 409(b) of the Communications Act requires that the commissioners who participate in the final disposition of a case must have been present at oral argument on exceptions to the examiner's initial decision.

The taking of evidence before the examiner in this case commenced in March of 1954. The examiner's initial decision was submitted some 15 months later (June 7, 1955). Eleven months more elapsed before argument was conducted on exceptions to the examiner's initial decision (May 25, 1956), and ten months more elapsed between the oral argument and final decision (March 6, 1957). A total period of three and one-half years therefore elapsed between the commencement of taking evidence and the Commission's final decision in this case—a time-consuming but entirely typical operation.

The previously referred-to Commission study reporting on the 53 comparative television hearings conducted during the period July 1, 1954 to March 7,

1958, does not give the total elapsed time from the first taking of evidence to final decision in those cases. But it does give the time periods: (1) from date of initial decision to date of final decision, and (2) from date of oral argument to date of final decision. The average time period between the dates of initial decision and final decision in those 53 cases—without regard to the specific number of applicants involved in each case—was 13.4 months, as contrasted with 22 months in this case. The average time period between oral argument on exceptions and the date of final decision in these cases was 6.8 months, as contrasted with ten months here. Further details given by the Commission's study show, as expected, that the time periods are correspondingly greater in cases where a greater number of applicants is involved. *E.g.*, the five four-party proceedings required an average time period of 11.2 months between oral argument and final decision, as contrasted with the ten month period here.[5] In brief, these figures demonstrate that agency action in the area of comparative selection among multiple applicants is already difficult and delayed, and that the case at bar is typical of such proceedings generally.

The circumstances considered, the coincidence of dates and numbers required for the disposal of cases such as this—pending for three or more years—already presents great procedural and practical difficulties. These arise out of present statutory provisions staggering the term periods of the seven commissioners [47 U.S.C. § 154(c)], and requiring the presence of commissioners at oral argument on exceptions to an examiner's initial decision as a qualification for par-

[5] *Ibid.*

ticipation in the final decision and order in such cases [47 U.S.C. § 409(b)].[6] The imposition of the further and legally unwarranted requirement of majority concurrence in the adoption of a final decision in multiparty proceedings will, as here, defeat or further unduly prolong final agency action. The only apparent alternative is agency action at the price of agreed abstentions of agency members, or the trading of agency votes, or both—a price which the law does not, and should not, require.[7]

II

The court's action in holding invalid the Commission's "second" vote of March 6, 1957, in which all seven commissioners participated, is based upon a subsidiary error, but one which compels attention and requires correction. It is manifestly clear that respondent WIBC waived any objection which it might otherwise have had to Commissioner Craven's vote participation. This is so because its counsel, when confronted with the Chairman's inquiry as to whether the parties objected to future participation by "any

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[6] In denying the petition for rehearing, the court stated that its ruling was based "solely on the fact that the decisive vote was cast by one who had not heard oral argument." (Appendix A, p. 3a.) Since at least one new commissioner is appointed each year, and since other commissioners are often absent from oral argument due to illness, duties out of town, etc., the court's decision presents practical difficulties of serious magnitude in multiparty proceedings.

[7] This Court has pointed out that where a rule governs the outcome of a vote and one construction "would be productive of the greatest inconvenience, [it] * * * ought not to be adopted, unless the legislative will to that effect is clearly expressed." *Cass County* v. *Johnston*, 95 U.S. 360, 369 (1877).

commissioner who is not present," had a duty to respond. (J.A. 8.) Having failed to do so, such failure cannot be converted into an asset to the detriment of others. *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

Here the facts of which respondent WIBC's counsel had both actual and constructive knowledge were such as to convince any reasonably prudent person that what did occur, would have occurred. When oral argument began on May 25, 1956, less than six weeks remained before the expiration of Commissioner Webster's term on June 30, 1956. His successor, T. A. M. Craven, had been nominated and his nomination was awaiting confirmation by the Senate. Since the 1952 amendment of section 5 of the Communications Act, it has been the function of the Commission's review staff to prepare decisions in cases according to instructions voted by the Commission after oral argument on exceptions to the examiner's initial decision. After the preparation of such a decision by the review staff, a later vote is taken by the Commission on its adoption. [47 U.S.C. § 155(c).] The Commission's study of comparative television proceedings already referred to *supra* shows that for the 53 proceedings in the July 1, 1954 to March 7, 1958 period, an average period of 5.5 months elapsed from the date of instructions to final decision regardless of the number of applicants involved. In a case such as this—involving four parties and a voluminous record—it was all but certain that a final decision could not, and would not, be made until after the expiration of Commissioner Webster's term.

To construe what occurred as amounting to less than respondent WIBC's consent for Commissioner Craven

to participate in the Commission's decision is to render human conduct meaningless. It is wholly unrealistic to contend that when the Chairman's inquiry was put, counsel for respondent did not consider and weigh the probable, if not certain, participation of Commissioner Craven in later stages of this proceeding. Moreover, the question could have had no other meaning than that attributed to it by the Commission. To hold, as the court apparently did, that the Chairman should have been more precise, or that other parties had the responsibility to determine his exact meaning for respondent WIBC, is both illogical and unsound.

But the basic and fundamental error committed by the court was its failure to give proper and legal effect to the findings and determination of the Commission on this subject. A majority of the Commission present at oral argument not only found that the failure of counsel to respond to the Chairman's inquiry amounted to an agreement to proceed and acted accordingly, but it later reached and stated the same conclusion in response to pleadings addressed specifically to this subject. It thus made an express finding on this subject not once, but twice. (J.A. 8, 182-189.)

In so doing the Commission performed an official act as necessary for the overall discharge of its duties under the Communications Act as any which can be imagined. It is not and cannot be the purpose of section 10(e) of the Administrative Procedure Act to permit a reviewing court to usurp the functions of an agency in matters of this kind.[8] Action of this sort

[8] In the case of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), the scope and purpose of judicial review of agency action

with respect to a lower court's determination would not be attempted by a court of appeals. The fact that an agency was involved here makes it even less acceptable.

On the assumption, which we deny, *supra*, that Commissioner Craven's vote was necessary for the adoption of the Commission's decision and order of March 6, 1957, it is manifestly clear that respondent WIBC waived any objection thereto and that such vote was properly cast. The Commission's decision was therefore validly adopted by the Commission's "second" or majority vote, if not by its "first" or plurality vote.

III

The judgment of which review is sought is not only destructive of proper agency action here, but will have serious consequences elsewhere. Because of the subject matter dealt with and because of the identity of the court, its effect as precedent can scarcely be overstated.

Here the United States Court of Appeals for the District of Columbia Circuit — with exclusive jurisdiction to review action of the Federal Communications Commission in the broadcast licensing field, and with exclusive or coordinate jurisdiction to review

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was exhaustively dealt with. Limitations upon the review of agency determinations which do not require agency expertise as well as those which do were recognized. In discussing its holding, on page 488, the Court said:

> "[We do not] mean that even as to matters *not requiring expertise* a court may displace the Board's choice between two conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." (Emphasis added in part.)

the action of virtually all federal agencies — has pronounced judgment. Moreover, the judgment pronounced not only is based upon erroneous considerations, but strikes at the very basis of the manner in which any agency may legally adopt a final order.

In imposing the majority vote requirement here, the court has decided erroneously an important question of federal law which has not been, but should be, settled by this Court. In refusing to accept the Commission's finding and determination on the waiver question, the court has decided a federal question in a manner in conflict with the applicable decisions of this Court and with the provisions and purpose of section 10(e) of the Administrative Procedure Act. The fact that the entire court of nine judges has specifically affirmed not only the holdings but the reasons of the panel which originally decided the case, further highlights its significance and importance.

CONCLUSION

As this Court has pointed out, the Communications Act was not intended as a code for the adjustment of private disputes. "Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

It is manifest that this purpose of the Act cannot be effectively carried out if confusion exists concerning the proper performance of one of the most important duties which the Commission must perform —the adoption of a final decision in a case such as this.

It is respectfully prayed that the instant petition for writ of certiorari be granted.

Respectfully submitted,

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